

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JOHN J. WILSON,

Plaintiff,

v.

No. 16cv114 WJ/LF

MARITZ-MAYER LABORATORIES,

Defendant.

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS* AND
DISMISSING COMPLAINT

THIS MATTER comes before the Court on *pro se* Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 4, filed March 2, 2016 ("Application"), and on his Complaint, Doc. 1, filed February 17, 2016. For the reasons stated below, the Court will **GRANT** Plaintiff's Application and **DISMISS** Plaintiff's Complaint **without** prejudice. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Application to Proceed *in forma pauperis*

The statute for proceedings *in forma pauperis*, 28 U.S.C. § 1915(a), provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

When a district court receives an application for leave to proceed in forma pauperis, it should examine the papers and determine if the requirements of [28 U.S.C.] § 1915(a) are satisfied. If they are, leave should be granted. Thereafter, if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.]

Menefee v. Werholtz, 368 Fed.Appx. 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox*, 305 F.2d 58,

60 (10th Cir. 1962). “[A]n application to proceed *in forma pauperis* should be evaluated in light of the applicant's present financial status.” *Scherer v. Kansas*, 263 Fed.Appx. 667, 669 (10th Cir. 2008) (citing *Holmes v. Hardy*, 852 F.2d 151, 153 (5th Cir.1988)). “The statute [allowing a litigant to proceed *in forma pauperis*] was intended for the benefit of those too poor to pay or give security for costs....” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 344 (1948). While a litigant need not be “absolutely destitute,” “an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life.” *Id.* at 339.

The Court will grant Plaintiff’s Application to Proceed in District Court Without Prepaying Fees or Costs. Plaintiff states that: (i) his monthly income is \$905.00 in social security and EBT; (ii) his monthly expenses are \$735.00;¹ (iii) he is unemployed; and (iv) he has no assets. The Court finds that Plaintiff is unable to pay the filing fee because he is unemployed and his monthly expenses, combined with his dental care expense, exceed his monthly income.

Jurisdiction

As the party seeking to invoke the jurisdiction of this Court, Plaintiff bears the burden of alleging facts that support jurisdiction. *See Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013) (“Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction”). Plaintiff states the Court has diversity jurisdiction over this matter. Subject matter jurisdiction under 28 U.S.C. 1332(a) requires a diversity of citizenship between the parties and an amount in controversy that exceeds \$75,000, exclusive of interest and costs. “Although allegations in the complaint need not be

¹ His monthly expenses total does not include \$4,200 for dental care.

specific or technical in nature, sufficient facts must be alleged to convince the district court that recoverable damages will bear a reasonable relation to the minimum jurisdictional floor.”

Marcus Food Co. v. DiPanfilo, 671 F.3d 1159, 1171 (10th Cir. 2011).

Plaintiff has not alleged sufficient facts to convince the Court that the amount in controversy exceeds the jurisdictional floor. Plaintiff alleges that he ordered two products on-line which were offered for the cost of shipping and handling, and that Defendant charged Plaintiff's credit card \$89.95.² Plaintiff called Defendant for an explanation and was told that Plaintiff “had consented to some sort of plan.” Complaint at 2. Other than his allegation that Defendant charged his credit card \$89.95, the only allegation in the Complaint regarding the amount in controversy is the conclusory statement that “the amount in controversy harm and damages done is in excess of \$75,000.00.” Complaint at 1-2.

Rule 12(h)(3) of the Federal Rules of Civil Procedure states: “If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” However, “pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991). The Court will dismiss Plaintiff's Complaint without prejudice because Plaintiff did not meet his burden of alleging facts that support jurisdiction.

Plaintiff may file an amended complaint within 21 days of entry of this Order. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Compliance with Rule 11

While the Court will permit Plaintiff to file an amended complaint, he must do so

² The Complaint alleges Defendant charged the credit card twice. It is not clear if Defendant charged \$89.95 twice or the total of the two charges is \$89.95.

consistent with Rule 11 of the Federal Rules of Civil Procedure. *See Yang v. Archuleta*, 525 F.3d 925, 927 n. 1 (10th Cir. 2008) (“*Pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.”). Rule 11(b) provides:

Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). Failure to comply with the requirements of Rule 11 may subject Plaintiff to sanctions, including monetary penalties and nonmonetary directives. *See* Fed. R. Civ. P. 11(c).

Service on Defendants

Section 1915 provides that the “officers of the court shall issue and serve all process, and perform all duties in [proceedings *in forma pauperis*]”). 28 U.S.C. § 1915(d). Rule 4 provides that:

At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

Fed. R. Civ. P. 4(c)(3).

The Court will not order service of Summons and Complaint on Defendant at this time. The Court will order service if Plaintiff timely files an amended complaint which alleges sufficient facts to convince the Court that recoverable damages will bear a reasonable relation to the minimum jurisdictional floor, and which includes the addresses of every defendant named in the amended complaint.

IT IS ORDERED THAT Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 4, filed March 2, 2016, is **GRANTED**.

IT IS ALSO ORDERED Plaintiff's Complaint, Doc. 1, filed February 17, 2016, is **DISMISSED without prejudice.** Plaintiff may file an amended complaint within 21 days of entry of this Order.



UNITED STATES DISTRICT JUDGE